

1 Lisa M. Panahi, Bar No. 023421
2 General Counsel
3 State Bar of Arizona
4 4201 N. 24th Street, Suite 100
5 Phoenix, AZ 85016-6288
6 (602) 340-7236

7 **IN THE SUPREME COURT**
8 **STATE OF ARIZONA**

9 In the Matter of:

Supreme Court No. R-20-0004

10 **PETITION TO AMEND RULES**
11 **3.2, 4.1, 41, AND FORMS 2(a) AND**
12 **2(b) OF THE ARIZONA RULES OF**
CRIMINAL PROCEDURE

COMMENT OF
THE STATE BAR OF ARIZONA

13
14 Pursuant to Rule 28(e) of the Arizona Rules of Supreme Court, the State Bar
15 of Arizona (the “State Bar”) hereby submits the following as its comment to the
16 above-captioned Petition. The analysis and details for this Comment are
17 substantially the product of the State Bar’s Criminal Practice and Procedure
18 Committee, composed of a balance of prosecution and defense practitioners, and
19 judicial members.

20
21 The Petition seeks to amend the Rules of Criminal Procedure and their related
22 forms to prohibit an arrestee from posting the arrest warrant bond *prior to* the initial
23 appearance (IA).
24
25

1 The Petition acknowledges that the magistrate issuing an arrest warrant in a
2 felony case “might have more information concerning an individual defendant’s
3 circumstances than an Initial Appearance magistrate [who possesses] only scant
4 information, and therefore could more knowledgably propose the type and amount of
5 a bond” necessary to secure the arrestee’s future court appearances—including the IA.
6 (Petition at 5). Nonetheless, the Petition avers that local Sheriff’s Offices have
7 implemented the practice of holding arrested persons in custody—“even if he/she posts
8 bond prior to the warrant-arrest IA” before the court. (*Id.* at 3). Petitioner contends the
9 Rules of Criminal Procedure should be amended to approve this practice. The proposed
10 procedure, however, violates an individual’s liberty interest, which is protected by the
11 federal and Arizona constitutions.
12
13
14

15 “No right is held more sacred, or is more carefully guarded, by the common law,
16 than the right of every individual to the possession and control of his own person, free
17 from all restraint or interference of others, unless by clear and unquestionable authority
18 of law.” *Simpson v. Miller*, 241 Ariz. 341, 345 (2017), quoting *Rasmussen by Mitchell*
19 *v. Fleming*, 154 Ariz. 207, 215-16 (1987), *Union Pac. Ry. Co. v. Botsford*, 141 U.S.
20 250, 251 (1891). “Thus, ‘[i]n our society liberty is the norm, and detention prior to trial
21 . . . is the carefully limited exception.’” *Simpson, supra.*, quoting *United States v.*
22 *Salerno*, 481 U.S. 739, 755 (1987).
23
24
25

1 “The United States Supreme Court has characterized the right to be free from
2 bodily restraint as ‘fundamental.’” *Simpson, supra.*, at 347. “[D]etention requires a
3 case-specific inquiry.” *Id.* at 349. The magistrate issuing a felony arrest warrant
4 establishes a bond congruent with a case-specific inquiry. The Petition would relegate
5 the magistrate’s determination of bond to one of merely “a recommendation”—subject
6 to enforcement or modification only *after* an arrestee is jailed and brought before the
7 IA judge.
8

9
10 Regulatory procedures which operate to automatically deny bond in all felony
11 cases, or which have the effect of denying bond after *the previously set bond amount*
12 *is posted*, are unconstitutional. *Cf. Simpson, supra.* at 349-350 (Arizona Constitution
13 and statute categorically denying bail for all persons charged with sexual conduct
14 with a minor held unconstitutional). Bond or bail for a felony may only be denied
15 under the provisions and procedure outlined in A.R.S. §13-3961(D), which requires
16 a motion by the state and implicitly includes the accused’s Sixth Amendment right
17 to assistance of counsel in challenging that motion. *Accord Rule 7.1, Ariz. R. Crim.*
18 *P.* (governing release and bond).
19

20
21 An accused felon’s liberty interests are protected by the posting of the bond
22 set in the arrest warrant; the state’s interest in compelling those accused of felony
23 offenses to appear in court are similarly protected. Once bond is posted, the
24
25

1 accused's scheduled IA provides no independent justification to increase the
2 previously set, posted bond amount. However, other facts might be brought to the
3 IA Court's attention warranting a change in the previously set bond or release
4 conditions. Where such articulable facts or circumstances come to light, the IA
5 officer has the discretion to modify the bond amount or any other release condition—
6 whether the accused is in custody or not—provided the accused is afforded counsel.
7
8 *See Kirby v. Illinois*, 406 U.S. 682, 688-89 (1972) (right to counsel attaches at or
9 after initiation of adversary judicial criminal proceeding). Conversely, where an
10 accused felon fails to appear, the IA judge may justifiably *sua sponte* modify the
11 conditions of his/her release.
12

13
14 Consequently, automatically holding an arrestee without bond—regardless of
15 the duration or purpose—is unconstitutional.

16 Other reasons exist to explain why the proposed modifications are untenable.
17 The implementation of the rules varies by locality. Often failure to appear warrants
18 issue from Superior Court without a bond amount. A bond is set at the initial
19 appearance on the failure to appear warrant. If Defendant posts the bond, he/she will
20 be released. But in the case at hand, Defendant is seen and a bond is set.
21

22 In misdemeanor IAs it is generally known that if Defendant has a \$2999 bond,
23 that trial judge will require that amount. Often, a bond amount will correspond to the
24
25

1 fine amount for a particular misdemeanor offense.

2 The rules regarding release presume a certain order of events - arrest or
3 summons, initial appearance, release conditions and perhaps a bond set, then
4 payment of the bond. But they do not preclude the payment of a bond and release
5 upon payment, nor may they.
6

7 **CONCLUSION**

8 For the reasons stated above, the State Bar of Arizona respectfully requests
9 that this Petition be denied.
10

11
12 RESPECTFULLY SUBMITTED this 1st day of May, 2020.

13 /s/ Lisa M. Panahi
14 Lisa M. Panahi
15 General Counsel

16 Electronic copy filed with the
17 Clerk of the Supreme Court of Arizona
18 this 1st day of May, 2020.

19 by: Patricia Seguin
20
21
22
23
24
25